LIBRARY
SUPREME COURT, U. S.

No. 928

JAN 10 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIAM ANDERSON and **HAROLD MOFFETT**,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MELVIN B. LEWIS
FRANK W. OLIVER
30 N. La Salle Street
Chicago, Illinois 60602
Telephone (312) 346-0570
Attorneys for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

	PAGE
Judgment and Opinion of the Court below	2
Jurisdictional statement	2
Questions presented for review	2
Constitutional Provisions, Statute and Rule	5
Statement of the Case	6
Comparison of the Transcripts	9
Request for a Hearing	14
Basis For Federal Jurisdiction	15
Reasons Relied on for Allowance of Writ	16
Knowing use of perjury	16
Where was Agent Tucker at 8 p.m.?	19
Other Questions	21
Did the perjury infect both cases?	23
The Emasculation of *Jencks* and Section 3500	26
How much perjury must be shown to obtain relief?	28
Were petitioners properly denied a hearing?	30
What is the proper test of a motion charging perjury?	31
Conclusion	33

Appendices:

PAGE

Appendix A—Opinion here presented for review App. 1

Appendix B—District court order dismissing motions ..... App. 12

Appendix C—Opinion affirming Anderson conviction ..... App. 15

Appendix D—Order affirming Moffett conviction App. 17

LIST OF AUTHORITIES CITED

Cases

Brady v. Maryland, 373 U.S. 83, 87 28

Jencks v. United States, 353 U.S. 657, 669 26

Miller v. Pate, 386 U.S. 1, 7 17

Constitutional Provisions, Statutes and Rules

Fifth Amendment (due process clause) 5, 17, 18

Title 18 U.S. Code, Sec. 2255 5-6

Rule 23, General Rules of District Court, N.D.Ill. 6

Title 18 U.S. Code, Sec. 3500, (reference) 26

In the Supreme Court of the United States

OCTOBER TERM, 1968

NO.

WILLIAM ANDERSON and HAROLD MOFETT,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, William Anderson and Harold Moffett, respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on November 13, 1968.

JUDGMENT AND OPINION OF THE COURTS BELOW

The opinion here presented for review, denying to Petitioners relief under 28 U.S.C. 2255, has not yet been reported, but is presented as Appendix A hereto. The District Court entered only a memorandum order, which is unreported, and which is set forth as Appendix B.

In the separate proceedings leading to Petitioners' original convictions, the District Court rendered no opinions and entered only formal orders. Each conviction was separately appealed to the Court of Appeals for the Seventh Circuit in 1966. The opinion affirming the conviction of Petitioner Anderson (Appendix C), was reported at 362 F. 2d 81. The appeal of Petitioner Moffett was decided by unreported minute order (Appendix D).

JURISDICTIONAL STATEMENT

The opinion here presented for review, was entered and dated November 13, 1968.

A petition for rehearing was timely filed, and was denied on December 10, 1968.

The jurisdiction of this Court is invoked under the provisions of Title 28 United States Code, Section 1254 (1). The last day for the filing of this Petition will be March 10, 1969 (28 U.S.C. 2101 c).

QUESTIONS PRESENTED FOR REVIEW

1. Does the restriction on State prosecutions expressed within *Miller* v. *Pate*, 386 U.S. 1 (1967), apply with equal force to Federal prosecutions?

2. Where a movant under 28 U.S.C. 2255, charges the knowing use of perjury by the prosecution, and presents a transcript of testimony by the agent-witnesses in another

proceeding, which testimony is basically inconsistent with the testimony of the same agents at his trial,

Then, what is the proper standard by which such a petition is to be tested against a motion for summary dismissal?

Is such a petition legally insufficient, if there remains the slightest mathematical possibility that the agents might have told the truth in both cases except for immaterial testimonial inconsistencies?

Or, on the other hand, is such a petition legally sufficient to require a hearing, unless it can be conclusively shown that perjury was not used by the prosecution?

3. Where it is clearly shown that the prosecution has withheld impeachment materials to which a criminal defendant is entitled under 18 U.S.C. 3500, is the prosecution's motive for such concealment, material to a determination of the petitioner's rights?

If so, must that motive be pleaded and proved by the government, or may it simply be presumed to have been benevolent?

Is it possible, even in theory, that furnishing a criminal defendant with contradictory statements by prosecution witnesses, could prejudice the defendant's rights?

And can the disclosures required by *Jencks* v. *United States*, 353 U.S. 657 (1957) and by 18 U.S.C. Sec. 3500, be withheld if the prosecutor feels that to grant such disclosure would cause confusion?

4. Where a federal prisoner acquires proof, not available to him at the time of his trial, that the prosecution knowingly used perjured testimony at his trial;

And where the entire issue at the trial, was whether the trier of fact would believe the prosecution evidence in preference to the defense testimony;

And where the newly discovered impeachment material, known but withheld by the prosecutor at the trial, would have discredited completely the testimony of all of the government witnesses; then,

Can such contradictory evidence possibly be termed immaterial, regardless of any other consideration?

5. When Federal agents testify to a connected series of events constituting two related but separate offenses, so that the evidence of each offense is of identical weight and character and proceeds from the same witnesses,

And when it has been established, after conviction, that the testimony concerning one of those two offenses, was false,

Can the conviction stand as to the other offense?

6. In a federal prosecution for narcotics violations, can evidence which renders it improbable or impossible that the government occurrence witnesses were in fact at the scene of the alleged crime, and that any crime was in fact committed, be termed immaterial or trivial for purposes of proceedings under 28 U.S.C. 2255?

7. Where a rule of Court denies the right to file a petition under 28 U.S.C. 2255 except "on forms supplied by the court";

And where those forms make no provision for any specific request for a hearing;

And where a petitioner, having complied with the rule and used the form prescribed by the Court in his original filing, then makes a request for a hearing;

Can a hearing be denied on the ground that no hearing was requested within the original motion?

Further, where a petition made on a form whose use is commanded by court rule, clearly shows that relief is sought under 28 U.S.C. 2255, which Statute requires that in a proper case the court shall ". . . grant a prompt hearing thereon . . .", is anything further required in order to obtain a hearing?

8. What will be the effect on our system of government, if the courts ignore a showing of wilful perjury by government agents in criminal cases, knowingly exploited by federal prosecutors?

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTE, AND COURT RULE

The Fifth Amendment to the Constitution of the United States provides, in relevant part,

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Title 18 U. S. Code, Section 2255 (62 Stat. 967, amended at 63 Stat. 105) provides, in relevant part,

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence . . . is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "A motion for such relief may be made at any time.
>
> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled

to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was . . . open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside. . . .

* * *

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus. . . ."

Rule 23 of the General Rules of the United States District Court for the Northern District of Illinois provides, in relevant part,

"1. Petitions for a writ of habeas corpus and motions filed pursuant to 28 United States Code, section 2255 (attacking a sentence imposed by this court), by persons in custody, shall be in writing . . . on forms supplied by the court."

STATEMENT OF THE CASE

This Petition seeks review of the action of the Court of Appeals in affirming the summary dismissal of Petitioner's motions under 28 U.S.C. 2255. Those motions sought relief from federal criminal convictions on the ground that the convictions were the products of knowing use of perjury by the government. It was alleged that the perjury had been committed by federal narcotics agents as government witnesses, with the knowledge and acquiescence of the prosecutor.

Petitioners are federal prisoners serving sentences imposed on separate convictions for narcotics violations. They were convicted in separate prosecutions which then seemed to be totally unrelated to each other. Neither the indictment nor the evidence in either case suggested that either Petitioner had engaged in any transaction which involved the other.[1]

Each Petitioner was separately charged with having alone sold heroin to Donald Tucker, a federal narcotics agent, on two different dates. There was no common date pleaded in the two indictments. The Moffett indictment charged unlawful sales on October 13, 1964 and December 18, 1964. (A. 14) The Anderson indictment charged such sales on December 17, 1964 and January 11, 1965 (A. 3).

The same federal narcotics agents acted as accusing witnesses for the government against each of the Petitioners. The same prosecutor represented the government at both trials. Petitioners were represented by different lawyers, and were tried before different judges, the trials taking place about three weeks apart.

At each trial, the agents testified to a continuing series of events in support of all charges in that case. At no stage of the proceedings at trial or on appeal, was any reference made in either case to the evidence or investigation relating to the other case. The agents' statements furnished pursuant to 18 U.S.C. 3500 at the trial of each petitioner, made no reference to any investigation concerning the other petitioner.

Moffett was convicted on all counts (A. 13). Anderson was acquitted on the counts relating to December 17,

---

[1] Petitioners were however, acquainted with each other prior to the indictments on which the present proceedings are based.

but was convicted on the counts charging violations on January 11. (A. 1) Each petitioner was separately sentenced and incarcerated. Each filed an appeal. The appeals were separately presented and both convictions were affirmed.

Petitioners were confined at the same federal penitentiary. Following affirmance of their convictions, and upon a subsequent comparison of the appellate transcripts of their respective trials, each petitioner filed his separate motion for relief under 28 U.S.C. 2255. Those motions, subsequently consolidated for hearing, are the basic subject matter of the present proceedings.

The motions claim, in brief, that the testimony of the agents in each case, is flatly contradicted by their testimony in the other case; that a comparison of the transcripts shows that the agents have sworn that they were in two different places at the same time, supposedly observing the petitioners in the commission of separate crimes.

The trial court dismissed the motions without hearing, upon a general finding that the transcripts of the two trials revealed no inconsistency in the agents' testimony (A. 22-24).

The court of appeals affirmed the dismissal, stating:

> A. Any testimonial discrepancy between the two transcripts, was minor or trivial.
>
> B. Petitioners have nothing at stake in the matter, since their claims related to the agents' testimony of the events of the night of December 17 and 18, 1964. Nullification of the charges relating to that transaction would not automatically shorten any of the sentences, it was held. Therefore, perjury relative to the events of December 17-18, standing alone, would be immaterial.

C. The withholding of impeachment material at the trials can be justified by the fact that both trials were conducted by the same prosecutor, who knew the whole story and "perhaps thought it would only confuse or prejudice" the cases if he were to make the disclosures.

D. It was not necessary to hold a hearing on the motions because the petitioners did not specifically request such hearing at the time the motions were first filed.

The comparison of the transcripts

The opinion of the Court of Appeals does not recite the facts with sufficient detail or precision to impart an appreciation of the full seriousness of the claims of perjury in this case. In a few instances, a misapprehension of significant record matter appears.

In view of the obvious importance of that issue, we will here present a concise statement showing the basis of the Petitioners' claim that the two transcripts are mutually contradictory.

Both cases started with a meeting of the agents and informer at 45th and Dan Ryan Expressway on December 17, 1964, at about 5:00 p.m. Agent Tucker and the informant drove together to the Grand Prix Tavern at 35th and Indiana (A. 3, 15). Agents Pringle and Hill maintained a watch from their car outside (A. 7, 18). Then:

* * *

Against Anderson, Tucker testified that on arrival at the Grand Prix he encountered Anderson whom he had never before met (A. 6) and sat with him and the informant at the bar (A. 3).

Against Moffett, Tucker testified that on arrival at the Grand Prix, he and the informant joined Moffett whom they encountered without prearrangement, who was standing at the bar (A. 15, 17).

* * *

Against Moffett, Tucker testified that he left the Grand Prix, following a ten minute talk with Moffett, went to the Subway Lounge Tavern, and was there joined by Moffett at 6:10 p.m. (A. 15).

Against Anderson, Tucker testified that he was still in the Grand Prix with Anderson at 6:30 p.m., having spent 30 or 40 minutes in conversation with him (A. 6).

* * *

Against Moffett, Tucker swore that on the night in question he spent the hours between 6:10 p.m. and 9:00 p.m. in the Subway Lounge Tavern (A. 15, 18) never leaving.[2]

---

[2] The Court of Appeals holds that "the record does not compel" this conclusion from Tucker's testimony, with reference to the period between 6:20 and 8:00 p.m. It is therefore, we hope, appropriate to detail Tucker's testimony on this issue: (Cross-examination)

Q. When you were in the Grand Prix Lounge, how long were you there?

A. Approximately 10 minutes.

Q. Where did you go after you left there?

A. To the Subway Lounge.

Q. You were only in those two places together with him [informant Pendleton]?

A. Well, during the period of time between 8:00 p.m. and 2:30 a.m. the next morning I was in and out, both of us were in and out of the Subway Lounge. (M. Tr. 78)

* * *

Q. Did you leave the Subway Lounge before Mr. Pendleton left?

A. No, Pendleton and I stayed at the Subway Lounge. Moffett said he would return about 8:00 p.m. We stayed at the Subway Lounge until around 9:00 o'clock. We then went

But against Anderson, he swore that he spent the hours between 6:00 p.m. and 7:45 p.m. of December 17 in the Grand Prix Tavern, getting a telephone call there and leaving just after 7:45 to buy heroin from Anderson many blocks distant (A. 6) [at 8:00 p.m., A. 7-8, Hill.]

* * *

Against Moffett, Tucker recounted a conversation with Moffett during which he gave Moffett money for heroin. Tucker swore the conversation took place in the Subway Lounge on December 17 between 6:10 p.m. (A. 15) [and 6:20 p.m., Hill, A. 19].

Against Anderson, Tucker swore that he spent that same time in the Grand Prix Tavern, arranging to buy heroin from Anderson and remained there until 7:45 (A. 6).

* * *

---

outside and sat in the car a little while and then came back into the Subway Lounge. (M. Tr. 81)

These answers were given by Tucker in order to refute the cross-examiner's suggestion that Pendleton might have obtained elsewhere, the heroin which Tucker testified Pendleton provided after meeting with Moffett. Obviously, defense counsel was unaware of the importance of the testimony thus given by Tucker, since he had no idea that a different set of reports existed which would, at a later date, form the basis of testimony by Tucker that he had been somewhere else from 6:10 until at least 8:30 that evening.

However, Tucker's answers to the cross-examiner are highly deceptive, however judged. For the cross-examiner's suggestion was in fact correct, according to Tucker's subsequent testimony in the Anderson trial. Pendleton had indeed received, a quantity of heroin in darkness *after* being searched and *before* dealing with Moffett. Tucker could not have testified with any certainty that Pendleton turned over to him *all* of the heroin he supposedly received at 8:00 p.m. on Federal Street. Thus, Tucker's answers to Moffett's counsel constituted a material falsehood, even if it be assumed that the agent testimony in both the Moffett and Anderson trials was otherwise true except for an inexplicably wide discrepancy in times.

Against Moffett, Tucker swore that from inside the Subway he watched Moffett leave the Subway [at 6:20 p.m:] (A. 15), where Tucker remained until 9:00 p.m. (A. 18).

Against Anderson, Tucker swore that from inside the Grand Prix, he watched Anderson leave the Grand Prix at 6:30 p.m., where Tucker remained until after 7:45 p.m. (A. 6).

• • •

Against Anderson, Tucker swore he was accepting a delivery of heroin from Anderson at 3651 Federal Street (A. 6) at the very time at which, against Moffett, Tucker swore he was waiting at the Subway (35th and Indiana) for Moffett to show up with heroin (A. 18). Both those events, crucial to the issue of Petitioners' guilt, are supposed to have occurred at 8:00 p.m. on December 17, 1964. It was at that time that Moffett had agreed to meet Tucker at the Subway, according to Tucker's testimony against Moffett (A. 15, 18). It was also at that time that Tucker brought heroin from Anderson a half mile away, according to the agents' testimony in the Anderson case (A. 6, 7-8). We emphasize this point in view of the reservations expressed by the Court of Appeals concerning the materiality of the testimonial contradictions.

Petitioners' motions also assigned contradictions within the testimony of Agents Hill and Pringle, who corroborated the testimony of Agent Tucker in each of the two trials.

In both cases, the corroborating agents testified that they drove together, following the informant's car which carried Tucker, and saw it park outside the Grand Prix

Lounge. They also saw Tucker and the informant enter the Grand Prix.[3]

Against Moffett, Agent Hill swore that he and Pringle, on arriving, saw Moffett's car parked across the street (Tr. 95). They then saw Tucker and the informant leave the Grand Prix for the Subway, followed 10 minutes later by Moffett (Tr. 96). They watched Moffett drive away at 6:20 (A. 19). Then (although there was no prearrangement for Tucker to meet Moffett, and no signal from Tucker) they followed Moffett to a point 3½ miles away, where they lost sight of his car in the heavy flow of traffic (A. 19).

Against Anderson, both agents testified that on arrival they saw a different car, later identified as Anderson's. The testimony of both agents is quite specific concerning what happened next (Direct Examination):

> (Pringle) Q. And what was the next thing that you observed [after Tucker parked and the Anderson car was noticed], Agent Pringle?
>
> A. At about 6:30 p.m. I observed William Anderson come out of the Grand Prix Lounge, enter the vehicle [and drive away]. (Tr. 81)
>
> • • •
>
> (Hill) Q. What did you and Agent Pringle do outside the Grand Prix Tavern?
>
> A. Outside the Grand Prix we maintained surveillance on the informant's car • • •. About 6:30 p.m. we observed William Anderson [drive away]. (Tr. 41-42)

---

[3] Pringle was present throughout the Moffett trial at the counsel table, (Tr. 3) but did not testify at that trial.

Then, the agents both agree, they followed Anderson (whom Tucker had never met and had merely encountered unexpectedly in the Grand Prix, and all without any signal from Tucker) to a point about a half mile away. (A. 7)

The request for a hearing

The Opinion of the Court of Appeals recites: "No hearing was requested by the petitioners in their original motions and consequently none was held."

The original motions were filed on forms furnished by the District Court. (Record, # 16618, Anderson, pp. 4-14; Record, # 16619, Moffett, pp. 3-15). Those forms, whose use by movants under Section 2255 is made mandatory by Local Rule 23, make no provision for a request for hearing.

A month later, both petitioners filed written motions to set the matter for immediate hearing and for other relief. (Docket entry, 1-9-67) Bail pending disposition was denied, and petitioners moved that they be returned from the penitentiary for the hearing (Docket Entry, 1-11-67). At this time, no pleading had been filed by the government.

Two months thereafter, Petitioners' motion that they be returned from the penitentiary was taken under advisement (Docket entry, 3/14/67), and the government was given an additional five days to complete its pleading.

On October 2, 1967, the matter was still under advisement. The Petitioners again moved on that date that the cause be set for an early hearing. This motion was likewise taken under advisement. (Docket entry 10-2-67).

On October 30, 1967, the District Court, without prior notice, entered an order dismissing the petitions as legally

insufficient (A. 22-24). No specific ruling was ever made on Petitioners' motion for a hearing, nor was the matter ever argued orally in the District Court on the merits.

BASIS FOR FEDERAL JURISDICTION

Petitioners are federal prisoners, confined in a United States Penitentiary pursuant to judgment of conviction entered in a United States District Court for violation of a criminal statute enacted by Congress. Their motions under 28 U.S.C. 2255 were accordingly filed in the United States District Court in which they had been sentenced. Federal jurisdiction of the motions, was not put in issue.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A. The knowing use of perjury

Petitioning counsel are not unmindful of the seriousness of the charges here presented: Charges of corruption and venality against federal law enforcement officers. But the record in this case compels us to put the matter thus bluntly for your Honors' consideration.

In view of the conclusiveness of the documentation of Petitioners' charges, it would be a failure of professional responsibility if we were to hestitate in accepting this representation, or in urging their position with vigor appropriate to the noxious character of the wrong that we ask your Honors to rectify.

The stubborn fact is that the federal agents involved, all testified repeatedly that each was in two different places at once.

The places were widely separated.

These flagrant contradictions covered the entirety of the time period of events alleged in the indictments as offenses. The contradictions go to the basic issue of whether or not any offenses were in fact committed, other than by the agents themselves.

The contradictory testimony was given at two different trials, before two different judges, against two different defendants represented by two different lawyers. In short, under circumstances which made it highly improbable that the fact of perjury would ever come to light.

It has now come to light. Vividly so.

The Petitioners have demonstrated to the Courts below quite conclusively, that they are imprisoned in consequence of perjury.

They have shown something quite beyond the knowing use of perjury by the government. They have literally shown the *commission* of perjury by the government.

They have demonstrated the existence of something grotesque, shocking, unbounded in its evil; something that must inevitably, unless firmly checked whenever detected, literally destroy the very essence of every facet of the judicial system above the desk-sergeant level.

And they have encountered utter indifference. Their complaint has been brushed aside with a litany of inapposite technicalities, based on a wishful view of the record.

They have received, in short, the juridical equivalent of the classic response to impertinence: "How dare you!"

Never has a case cried so clearly for "the exercise of this court's power of supervision," lest that very power atrophy.

No principle has been articulated with greater clarity or vigor, than that expressed by this Court in *Miller* v. *Pate*, 386 U.S. 1, 7 (1967): "The Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the use of false evidence." As shown by the cases there cited, this principle has been guarded jealously for more than thirty years without the slightest erosion.

But what of the due process requirements of the Fifth Amendment?

Our researches have disclosed no reported case from any court, in which relief has been granted to a movant under 28 U.S.C. 2255 who claimed knowing use of perjury by

federal authorities. Not once, so far as we have found, has any court ruled, on a contest, that such a basis for relief had been established. In fact, not once, to our knowledge, has it been held, on a contest, that any such petition stated a cause of action on its face.

As in the opinion here presented for review, the principle is universally acknowledged. It has simply never been found applicable.

That fact would be something in which we might all take pride, but for the nagging doubts engendered by the case at bar:

Is the conscious employment of perjury in federal prosecutions, truly unknown—or merely unrecognized? Is the historic freedom of federal prosecutions from the taint of perjury, merely a symbolic trophy guarded against tarnish, not by preventive watchfulness, but by gloss quickly applied whenever spots have appeared?

Have the words "due process" any different meaning, or any lesser status of compelling necessity, in the Fifth Amendment than in the Fourteenth?

The words "federal agent" cover a vast spectrum of activities, from those of the most sophisticated investigative organization that the world has ever seen, to that of beat policemen and installation guards. Against this broad backdrop of varied police agencies, it is most unrealistic to imagine that perjury could never be employed to obtain a conviction. Assuredly, it is a reflection only on the immediate participants in the perjury, where the fact is established.

But to blink at the facts—to shrug, to rationalize, to ignore—is to lose the feeling, the fact of freedom. No

right, however clearly expressed in theory, can survive a tolerance toward police perjury.

It cannot be supposed, that the immediate effect of the proceedings below will be to constitute any court a mere arm and agency of the police. But it is realistic to anticipate that the opinion here sought to be reviewed, once embellished with the notation *"cert. den."*, will be a meaningful step toward a weakening of all rights which our Constitution would grant.

For the appearance of justice, axiomatically, is equally important with justice itself. The mere truth that the Court below will not suffer itself to become simply an arm of the police, and will not salvage convictions for them by ignoring obvious facts, is not challenged here; but that truth, standing alone, is not enough. It must also *appear* to be true.

Otherwise, the police will misunderstand—and act accordingly.

Just such misunderstanding, just such actions, could be the widespread consequence of the present opinion.

To this Court's sense of history, and to the conscience of those who will act for the government before your Honors in this case, we commend those thoughts, together with the questions that follow.

The court below has characterized the "alleged inconsistencies" as "nonexistent or only trivial." We must therefore ask:

WHERE WAS AGENT TUCKER AT 8 P.M. ON DECEMBER 17?

If any part of the testimony against Petitioner Anderson was true, then, at 8 P.M. on December 17, Tucker was hidden in the rear seat of the informant's car, observing

a transfer of heroin at 3651 South Federal. From there, he drove to 45th Street and Dan Ryan Expressway, where he met his fellow agents, tested the substance thus acquired, obtained a positive reaction, and then searched both the informant and the informant's vehicle. (A. 4, 7, 8; Anderson Tr. 14)

If any part of the testimony against Petitioner Moffett was true, then, at 8 P.M. on December 17, Tucker was in the Subway Lounge at 35th and Indiana Avenues, waiting for Moffett, who had agreed to meet him there at that time to sell him heroin. (A. 15, 18) He swore that he continued to wait for Moffett until 9 p.m. (A. 18)

Where was Tucker? At both places!

These are not mere "inconsistencies." They are irreconcilable contradictions.

They are not "nonexistent." They are all too painfully clear and present.

They are not "trivial." They go to the very heart of the question of Petitioners' guilt. They are not directed to a peripheral issue, but to the central core of the ultimate issue presented at the trial.

The opinion below does not face this issue. Instead, it recites that the Anderson purchase was "consummated" at 7:55, and that Tucker then returned to the Subway Lounge between 8 and 8:30 p.m. In that aspect, the opinion is totally lacking in record support. The surveilling agents testified in the Anderson case that Anderson came to the rendezvous at 7:55, but that Tucker and the informant arrived five minutes later (A. 7, 8, 10). And as previously noted, Tucker's testimony against Moffett is very clear that at 8:00 p.m. he was waiting in the Subway

Lounge for a heroin purchase appointed for that very time. There is no possible way that the record can be made to demonstrate Tucker's arrival at the Subway between 8 and 8:30. If his testimony means anything at all, it means that at 8:00 he was in the Subway waiting for Moffett, had been there for some time, and continued to wait.

No trial lawyer could ever hope for anything more meaningful, than the opportunity to cross examine a witness while armed with impeachment material of this magnitude.

But the opinion below, effectively precludes any such opportunity, in this or in any case. The very purpose of a trial is cast in doubt.

And there are other questions, equally valid, and equally puzzling. In reciting them, we would remind your Honors that in each case, the answer to each branch of the dichotomy, according to the agent's testimony, is "Yes."

OTHER QUESTIONS

When Tucker first entered the Grand Prix Lounge, did he meet Anderson and sit with him at the bar (A. 3)? *Yes.* Or did he meet Moffett standing at the bar, and join him there (A. 15, 17)? *Also Yes.*

Did he next converse briefly and secretively with Moffett about narcotics, and after ten minutes leave the Grand Prix for the Subway where he then had a further conversation with Moffett from 6:10 to 6:20 (A. 15)? *Yes.* Or did he next converse secretively with Anderson about narcotics, continuously for 30 or 40 minutes, all in the Grand Prix, ending the conversation at 6:30 (A. 6)? *Also Yes.*

Did he spend the period from 6:10 to 9:00 in the Subway waiting for Moffett? *Yes.* And did he receive a telephone call from Anderson at the Grand Prix at 7:45? *Also Yes.*

There is no way on earth that these stories can all be true.

Parenthetically, the Moffett and Anderson deliveries of heroin on the December night in question bore a remarkable similarity.

While Tucker hid on the floor of the informant's car, he saw a HAND reach through the informant's window, and saw that hand transfer a foil package of heroin to the informant.

Against Moffett, the hand was Moffett's (A. 16).

Against Anderson, the hand was Anderson's (A. 4).

The mathematical probability against the coincidence of such events' concurrence on the same evening must be astronomical.

* * *

And what of the surveilling agents, Hill and Pringle? Against Anderson, they swore that they kept a surveillance on the informant's car from the time it first arrived at the Grand Prix until they left to follow Anderson at 6:30 (Tr. 41-42, 81). Against Moffett, they swore that commencing at 6:20 they followed him 3½ miles away from the scene before losing him in heavy traffic (A. 19). The court below says they could have done both. But it reaches this result by pointing out that most of the trip (totalling seven miles) was on an expressway; by presuming that the times were only "close approximations", contrary to standard agent procedure; and by ignoring the testimony concerning the supposed continuing surveillance of the informant's car.

Also ignored, are the facts that the expressway had a speed limit of only 45 mph at the place in question; that it was accessible only by a four-block trip through the most

congested part of the city, on the Saturday evening preceding Christmas Eve, with stop lights at every intersection; and that the question was properly to be decided at the criminal trial, rather than by a court of review speculating whether a jury could have believed the agent's testimony if the facts had been disclosed.

If Hill and Pringle followed Moffett at 6:20, it would have been an utter impossibility for them to have returned in time to have followed Anderson at 6:30, even assuming that they spent no time trying to find Moffett when they supposedly lost him at 59th Street. We defy anyone to make that trip, even in clear weather and light traffic, in half again the time necessary to reconcile the agents' testimony at the two trials.

DID THE PERJURY INFECT BOTH CASES?

It is absolutely certain that the agents' testimony in at least one of the two cases, was false. The record establishes the probability that the testimony was false in both of them. At the very least, it is impossible for the government to show in which of the cases, if either, their testimony was true.

But the strong inference obtains, that the testimony was false in both cases. That inference does not flow from contradictions between the two transcripts, but from the improbabilities raised if each transcript is viewed separately. Thus:

In the Moffett case, Tucker testified that on December 17 when he went to the Grand Prix, he happened to encounter Moffett there.

There was no prearrangement to meet Moffett (A. 17).

There was no communication to agents Hill and Pringle in the shadowing car.

Yet, though not advised that Moffett was the target, Pringle and Hill obligingly, if unaccountably, followed Moffett away from 35th and Indiana.

In the Anderson case, Tucker had never even *met* Anderson when he encountered him in the Grand Prix without prearrangement (A. 3, 4; Tr. 5, 6).

No signal was made to Pringle and Hill.

Yet, though not advised that Anderson was the target, Pringle and Hill obligingly, if unaccountably, followed Anderson away from 35th and Indiana.

The Court of Appeals considered this argument unjustified, because the surveilling agents had previously conducted an investigation against Moffett, and therefore might logically have followed him on sight.

But what of Anderson? There is no evidence that Anderson, whom Tucker had never before met, was the subject of any earlier investigation. Why would the agents have followed him, without any apparent reason?

And most important: Would they have been likely, in the circumstances, to have left the scene to follow anyone, without telling Tucker what they were doing? Had they followed either Moffett or Anderson from the area, agents Hill and Pringle would have violated that most basic principle of police work, "Do not secretly desert your post while charged with the duty of protecting a dependent and unsuspecting comrade." Yet they claim they left Tucker without any warning to him, in order to follow each of the Petitioners in frantic succession.

• • •

The seriousness of the offense of perjury, was noted at the trials of each of the appellants.

The length of the sentence imposed on appellant Anderson, and the denial to him of bail pending appeal, reflected the trial judge's belief that,

> ". . . the evidence was so clear and so convincing and so certain and it was only disputed by the testimony of the defendant. I believe from what I heard that the defendant committed perjury when he took the stand and testified." (Tr. 11/2/65, p. 36)

At the conclusion of the Moffett trial, the experienced trial judge rendered the following observation:

> "Well, this whole case turns upon the credibility of the witnesses in the case.
>
> "The Federal Agents have testified as to what occurred at the different times and places involved in this indictment. The defendant has denied it.
>
> "If I were to follow the suggestions of the defense in this case, I would have to believe that these different agents of the Government were engaged in a conspiracy to bring about a conviction in this case and they had committed perjury in connection with that conspiracy. I am unable to believe that." (Tr. 214-215)

We suggest that he would believe it now.

In each of these cases, the defendants were previous narcotics offenders. Each of them testified in his own behalf, denying the accusations. Each of them took the most unusual step of testifying and denying the truth of the stories told by the agents. In effect, they charged the agents with perjury.

And they were right. They were unable to prove the fact then. But it has been proven now: flagrant, cynical and documented perjury.

Clearly and literally that. It cannot be ignored.

B. The emasculation of Jencks and Section 3500

Each petitioner sought and was given statements submitted by the agent-witnesses, in purported compliance with the requirements of 18 U.S.C. Sec. 3500.

No trial lawyer could have asked for anything more than the impeachment materials available here. For the lawyer defending Moffett to have had the statements submitted at the Anderson trial, or vice versa, would have been a once-in-a-lifetime opportunity for any advocate. He could have destroyed, utterly, any claim by Tucker and his fellow agents to the slightest credibility.

But the materials were not furnished.

Thus, Petitioners were each severally deprived, consciously and deliberately, of the very rights which this Court has taken pains to establish and safeguard because "Justice requires no less." *Jencks* v. *United States*, 353 U.S. 657, 669 (1957).

The impeachment materials were withheld in accordance with an established practice and policy which has evolved under the procedures adopted pursuant to 18 U.S.C. 3500.

It has literally become an article of faith, that if a report deals in any portion with matter affecting the investigation of someone other than the defendant on trial, that portion must be excised from the reports as furnished at the trial. Thus, the reports furnished under Section 3500 are seldom a reliable chronological account of the witness' activities during the period covered by his testimony. Rather, they are an edited version of the original statement, and the omissions frequently destroy the value of the reports as impeachment material. This is an open secret to every lawyer trying criminal cases.

The case at bar illustrates the problem well. For the Petitioners were each placed in a much worse position than was the defendant in *Jencks*. That defendant at least knew that statements, potentially impeaching of the government witnesses, did in fact exist if he could but compel their production. But the Petitioners here were misled into believing that the agents' reports were completely consistent with the testimony from the stand, and that no possible impeachment was available.

And now, by the opinion below, the *Jencks* doctrine has been dealt yet another crippling, perhaps fatal blow. The Court below held that the fact that inconsistent testimony was presented at separate trials by the same prosecutor "who was aware of all the activities of the agents", is actually an *extenuating* circumstance. That, because he "perhaps thought it would only confuse or prejudice the presentation of each case to interject details relating to the other defendant."

It is, we suggest, quite unrealistic to imagine that the prosecutor withheld impeachment materials from Petitioners for fear of causing them harm or prejudice. It is not even theoretically possible to prejudice a criminal defendant by providing him with such reports. Certainly, there is no excuse, in evidence or otherwise, offered by the prosecution to justify that conjecture.

But if that possibility of prejudice can be construed to justify the holding back of impeachment material, prosecutors will be only too happy to protect a defendant's rights in that manner.

And we suppose that from the standpoint of the proponent of a witness, anything that enables an adversary to impeach that witness tends to "confuse" the case. The

opinion below is nothing less than authority for the withholding of disclosure if the prosecutor "perhaps thought" that the disclosures might generate such confusion.

There is no basis for the conjecture as to the prosecutor's motive in withholding the disclosure. The record is free from any explanation for his action. But properly viewed, we urge, his motive is immaterial. As your Honors stated in *Brady* v. *Maryland*, (1963), 373 U.S. 83, 87:

> "... the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

We suggest that this would be an excellent occasion to reaffirm the vitality of that doctrine, and to rescue the lesson of *Jencks* from the brink of oblivion.

C. How much perjury must be shown to obtain relief?

In each of the Petitioners' trials, the agents testified to a connected series of events in the course of which two narcotics sales were supposedly made by each petitioner.

In consequence of that testimony, each of Petitioners was convicted of an offense which did not occur on the night of December 17. Moffett was convicted of the December 17 transaction, plus one other. Anderson was acquitted of the December 17 transaction, and convicted of another.

The Petitioners have now uncovered evidence demonstrating that the agent testimony concerning the night of December 17, was perjury. But the Court of Appeals holds, in essence, that this is not enough. They must also obtain proof that the testimony concerning the other transactions, was likewise perjured.

That may be an appropriate rule, where A testifies that a defendant committed Crime X, and B testifies independently to the commission of Crime Y, and concurrent sentences result. Such a case would probably not compel the conclusion that perjury by A contributed to the conviction of Crime Y.

But in this case, the same agents testified to a continuing investigation involving two offenses. The evidence of each offense was of precisely the same weight and quality, interlinked and interdependent. Proof that the agents had lied concerning one transaction, would inevitably have been determinative, in the mind of the jury, of innocence on all counts.

This observation has special force in the case of Petitioner Anderson. Faced with evidence of two transactions, which evidence was of identical quality, the jury acquitted on one and convicted on another. In civil law, this would have been considered an improper "quotient" verdict. Anderson appealed on precisely that point. But the Court held that verdicts in criminal cases need not be consistent.

Now, having evidence that the agents lied, he is told that such evidence is unavailing if it relates only to the counts on which he was acquitted.

The flaws in that doctrine, are twofold.

First, it is quite common for defendant to be charged with only one formal offense, and convicted on testimony which shows the commission of a number of offenses. The non-indictment offenses are shown to establish pattern, or intent, or to furnish explanatory background. Perjury with regard to any such matter contributes to a conviction, just as surely as will perjury on the specific transaction charged in the indictment. To limit the effect of perjury

to the specific transaction charged in the indictment, is to invite perjury on related transactions, and establishes a totally artificial balance for the weighing of the most serious injustice to which an accused can be subjected.

Second, it would be quite consistent with the holding below, to deny relief to a defendant convicted and concurrently sentenced on five transactions, if he can prove perjury as to only four of them. If he is convicted (and concurrently sentenced) on *n* charges, it avails him nothing to obtain evidence that perjury was knowingly used to prove *n-1* of those charges.

The only proper rule, is one which limits the inquiry to whether the perjury might have contributed to the conviction. Anything else will deprive perjury of its significance, and may even give it encouragement.

D. Were Petitioners properly denied a hearing?

The opinion below states that Petitioners were properly denied a hearing because "no hearing was requested by the petitioners in their *original* motions . . ." (Emphasis supplied)

The relevance of that assertion, is not immediately apparent. Petitioners' motions were made on the only form permitted by Rule 33 of the District Court. That form made no provision for any such request.

But six weeks prior to the filing of the government's answer, Petitioners formally requested a hearing. They made the request repeatedly thereafter in the District Court.

And their original motions clearly sought relief under 28 U.S.C. 2255. That Statute commands a prompt hearing

wherever the motion is legally sufficient on its face. We can see no reason why a specific request for hearing should be required, where that relief is automatic and mandatory under the Statute.

We would agree, of course, that if the Petitioners' motions showed on their face that Petitioners were entitled to no relief, then, obviously, no hearing would have been required. It was on that basis that the petitions were dismissed without hearing in the District Court.

But the opinion of the Court of Appeals is actually authority for the denial of a hearing in every proceeding under 28 U.S.C. 2255. The movant can not request a hearing within the original motion filed by him in any such case, because he must use a form which makes no provision for such a request. To make the request by separate motion, as Petitioners did, will be useless because the original motion is deemed determinative under the present opinion.

We cannot suggest any conceivable basis for that ruling, and we cannot begin to exhaust the lengthy list of arguments against it.

E. What is the proper test of a motion charging perjury?

We would urge that the basic flaw of the opinion below, is that it is wrongly oriented in its basic thrust.

The opinion assumes that where a motion charging perjury is dismissed without hearing, the issue is whether there is any mathematical possibility that no perjury was employed by the prosecution.

Such an approach is inconsistent with a realistic appreciation of the seriousness of perjury.

We think it obvious that the proper test is whether the motion presents a viable possibility that the conviction was tainted by perjury. If so, the respondent must answer. Based on the issues as thus delineated, the movant is entitled either to a hearing or to summary relief. If the motion shows that the movant is entitled to no relief, the motion should be dismissed, and no answer by the Respondent would be necessary.

The approach taken by the Court of Appeals might be appropriate if this were a review of a conviction rendered in the face of the impeachment provided by the testimony in a different case. It might be appropriate, although much less so, if this were a review of a finding by the trial judge, after hearing evidence on such a motion, that the judgments of conviction should stand.

But that approach is completely inapposite, on review of a dismissal without a hearing. The issue presented, is the sufficiency of the motion, and not whether the trier of fact at the original trial might have reached the same result even if all the facts had been known.

Nothing could be more clear on this record, than that the agents committed perjury at the trial stage. Beyond possibility of doubt, relevant impeachment materials were wrongfully concealed from each of the Petitioners. That is all that any movant under 28 U.S.C. 2255 could ever show, and it is all that he should ever have to show.

In no such proceeding, could any movant ever prove that there is no possibility that the outcome of the trial would not have been the same if the misconduct had not occurred.

The opinion below, is in serious error in proceeding as though the issues had been factually determined against Petitioners at their original trials.

CONCLUSION

The basic denial of rights to these Petitioners, has an ominous import for all rights of all citizens.

We pray that your Honors may deem this case worthy of review. There may well be no more meaningful request, ever to be made of this Court.

Respectfully submitted,

MELVIN B. LEWIS
FRANK W. OLIVER
Attorneys for Petitioners.

APPENDIX A

Opinion of the Court of Appeals, here presented for review

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 SEPTEMBER SESSION, 1968

No. 16618
WILLIAM ANDERSON,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 16619
HAROLD MOFFETT,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

November 13, 1968

Before KILEY, SWYGERT and CUMMINGS, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This is an appeal from an order denying the petitioners' motions under 28 U.S.C. § 2255 to vacate the convictions and sentences under which they are serving. Petitioners' motions alleged un-

lawful imprisonment arising from the use of perjury at their seperate trials. Both petitioners further alleged that their convictions were the product of the knowing use of perjury by Government agents and an assistant United States Attorney.

The petitioners contended and the Government agreed that the relevant facts are contained in the official transcripts of evidence submitted at the two trials, and accordingly there was no need for an evidentiary hearing. No hearing was requested by the petitioners in their original motions and consequently none was held.

The district court considered the petitions jointly and dismissed them without hearing. The court ruled that the records showed that the petitioners were entitled to no relief and that careful examination did "not reveal . . . any of the inconsistencies which each of the petitioners would read into the testimony and which each alleges to exist."

Petitioner Harold Moffett was charged in a four-count indictment with the unlawful receipt, concealment, and sale of narcotics on October 13, 1964 and December 18, 1964. At a nonjury trial before District Judge Michael L. Igoe, Moffett was found guilty on all four counts and given concurrent ten-year sentences on each count.

Petitioner William Anderson was charged in a four-count indictment with the unlawful sale, concealment, and transportation of narcotics on December 17, 1964 and January 11, 1965. At a jury trial, held three weeks after the Moffett proceedings, before District Judge Joseph Sam Perry, Anderson was convicted on the counts relating to the January transaction, but acquitted on the counts re-

lating to the December charge. Concurrent sentences of fifteen years for the convictions arising from the two January counts were imposed on Anderson.

Both defendants appealed their convictions and both convictions were affirmed by this court. *United States* v. *Moffett*, No. 15509 (7th Cir. 1966); *United States* v. *Anderson*, 362 F.2d 81 (7th Cir. 1966).

The evidentiary transcripts of the individual trials reveal the following sequence of events during the night in question, December 17-18, 1964. About 5 p.m., on December 17, Federal narcotics agents Tucker, Hill, and Pringle met an informant, Pendleton, at 45th and the Dan Ryan Expresway in Chicago. They drove together to the Grand Prix Tavern at 35th and Indiana. Between 5:30 and 6 p.m. agents Pringle and Hill maintained a watch from their car outside while agent Tucker and the informant went into the Grand Prix where they met defendant Moffett. After talking with Moffett, Tucker and Pendleton stayed at the Grand Prix about ten minutes and then walked one-quarter block down the street to the Subway Lounge where Moffett rejoined them about 6:10 p.m.

A conversation with Moffett, during which agent Tucker gave him money for heroin, took place at the Subway Lounge between 6:10 and 6:20 p.m. Moffett promised Tucker and Pendleton that he would return to the Subway Lounge about 8 p.m. to conclude the narcotics deal. Tucker testified that from inside the Subway Lounge he watched Moffett leave the Lounge at 6:20 p.m. Agents Hill and Pringle also watched Moffett leave the Lounge and followed him by car to a point about three and one-half miles from the Subway where they lost his car in heavy traffic.

While Tim and Pringle pursued Moffett, agent Tucker and the informant were meeting with Anderson at the Grand Prix. Agent Tucker testified that sometime during the twenty or thirty minutes before 6:30 p.m. he discussed the purchase of narcotics with Anderson and that at 6:30 p.m. Anderson left the Grand Prix. About 7:45 p.m. a phone call from Anderson to the informant was monitored by Tucker at the Grand Prix. Tucker and the informant left the Grand Prix and drove a short distance to a parking lot where Tucker saw Anderson stoop down, pick up a small package from the ground and deliver it to the informant. At 7:55 p.m. the informant consummated the purchase from Anderson. The informant and Tucker proceeded about ten blocks to a point where a test was made which established the package's contents as narcotics.

Testimony in the Moffett trial next places the informant and agent Tucker back at the Subway Lounge between 8 and 8:30 p.m. where they waited until 2:30 a.m. on December 18th when they made a narcotics purchase from Moffett.

Although Anderson was acquitted on the charges covering the December 17th transaction, in this proceeding he claims that his sentence and conviction are the product of Government perjury in regard to that transaction. Likewise, Moffett complains that because the testimony relating to the events of December 17th and 18th was perjured, he was convicted on two counts of the indictment relating to the sale and possession of narcotics on December 18, 1964. However, Moffett was also convicted on two counts covering possession and sale of narcotics for a wholly unrelated transaction which occurred on October 13, 1964. Therefore, it is hard to imagine what

petitioners could possibly gain if successful in this appeal since they still would stand convicted of the offenses which were unrelated to the December 17-18 events.

Nonetheless, petitioners attempt to avoid this observation by claiming that if the trier of facts in each case had been aware of the alleged perjury of the agents covering the December 17th and 18th events, then the respective triers of fact would have been highly unlikely to find the petitioners guilty as to the occurrences on the other dates. In other words, the petitioners contend that the alleged perjury so pervaded the entire proceedings that all the convictions are tainted. Since, as we will indicate below, these perjury allegations are unsupported by the record, we need not consider this argument advanced by the petitioners.

The law applicable to the knowing use of perjury at trial is settled. A criminal conviction procured by the use of testimony known by the prosecuting authorities to be perjured and knowingly used by them in order to procure a conviction does not comport with due process of law and is violative of a defendant's constitutional rights. *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Hysler* v. *Florida*, 315 U.S. 411 (1942); *United States* v. *Spadafora*, 200 F.2d 140 (7th Cir. 1952). The knowing use by the Government of perjured testimony in order to obtain a conviction would, if proved, be grounds under section 2255 for vacation of a conviction under circumstances such as exist here where the petitioners assert that they were unaware of the alleged perjury both at the time of the trial and the appeals. A defendant has the burden of making a showing, not only that material perjured testimony was used to convict him, but that it was knowingly and intentionally used by the prosecuting authorities to do so. *United States* v. *Spadafora*, 200 F.2d at 142.

Mere inconsistencies or conflicts between the testimony of a witness or witnesses are not enough. "[T]rivial conflicts in testimony . . . do not constitute perjury. . . . Those experienced in the trial of cases realize that it is a common occurrence to have some conflicts in the testimony of witnesses, and that any conflict in itself is not a signpost of perjury." *United States* v. *Spadafora,* 200 F.2d at 142. More than "immaterial inconsistencies" are required for perjury. *Enzor* v. *United States,* 296 F.2d 62, 63 (5th Cir. 1961).

The standard of perjury, that is, some palpable testimonial contradiction or untruth, is applicable not only to a case like *Spadafora* where the alleged perjury occurred within the context of a single trial, but also to the cases at bar where the alleged perjury occurred, if at all, in the course of the testimony of the same witnesses at different trials.

Although we recognize that the rationale for the palpable contradiction rule, namely, that "[a]ny conflicting statement of witnesses upon the trial . . . [are] for the jury to resolve," *United State* v. *Spadafora,* 200 F.2d at 147, is inapplicable where the perjury arises from testimony given at separate trials before different triers of fact, we still believe that, regardless of the alleged perjury's context, immaterial testimonial inconsistencies by themselves do not constitute perjury.

Moreover, to be grounds for relief under section 2255, the testimonial inconsistencies must have a direct relationship to the transactions which formed the basis of the conviction. In *United States* v. *Abbinanti,* 338 F.2d 331, 332 (2nd Cir. 1964), in affirming the denial of a section 2255 motion, the court, answering the petitioner's claim

that his conviction rested on perjured testimony, said, "Even if Moreton [witness] was mistaken as to these matters [certain time testimony], they have no direct bearing on whether Abbinanti purchased, possessed and sold narcotics himself. . . ."

Turning to the allegations of perjury in the cases at bar, it is apparent that agent Tucker's whereabouts from the time of Moffett's departure from the Subway Lounge at 6:20 p.m. to about 8 p.m. when Tucker testified that he and the informant were at the Subway waiting for Moffett's return provides the ambiguity which underlies most of the perjury charges. Petitioners claim that since agent Tucker remained at the Subway between 6:20 and 8 p.m., the narcotics sale by Anderson could not have taken place. Apart from some additional inconsequential testimonial discrepancies, it is the precise sequence of agent Tucker's activities during this period of time which is the focus of this appeal.

Petitioners state that agent Tucker, in the Moffett trial "[s]wore that on the night in question he spent the hours between 6 and 9 p.m. in the Subway Lounge Tavern never leaving." We find this conclusion is unwarranted in light of Tucker's testimony hereinafter quoted. In fact, at the Moffett trial, Tucker was never even questioned specifically about the events that happened between 6:20 p.m. when Moffett left Tucker at the Subway Lounge and 8 p.m. when Moffett promised to return.

The Moffett transcript indicates that Tucker testified only broadly as to the general sequence of events between 6:20 p.m. and 2:30 a.m. On direct examination Tucker testified:

Q. Was there any further conversation in the Subway with you and the defendant Harold Moffett, at this time [6:10 p.m.]?

A. Yes. Again, Moffett told me that he wanted the money out front. . . . I agreed to his demands and at Moffett's request I placed $105 official advanced funds on the bar. Moffett took the $105 official advanced funds, counted the money, and told me he would return to the Subway at approximately 8:00 p.m.

Q. Did he leave the Subway Lounge?

A. Yes, he did.

* * *

Q. As he was leaving the Subway Lounge, did you do anything?

A. Yes, I looked out the window of the Lounge to observe the direction in which Moffett was going. I observed him get into his vehicle with several other people and drive north on Indiana out of my view.

Q. Did Mr. Moffett subsequently return to the Subway Lounge?

A. He didn't return to the Subway Lounge until 2:30 a.m. the next morning. Early the next morning.

Next, on cross-examination, Tucker was asked where he had been with the informant after Moffett left the Subway Lounge. He responded:

> Well, during the period of time between 8:00 p.m. and 2:30 a.m. the next morning I was in and out, both of us were in and out of the Subway Lounge.

Under further cross-examination, Tucker was asked whether he knew anyone in the Subway at the time he first spoke with Moffett. Then he was asked:

Q. Then you left the Subway Lounge, did you?
A. At what time?
Q. Well, excuse me. Strike that, please. I will ask you a different question.
(Question withdrawn.)
Q. Did you leave the Subway Lounge before Mr. Pendleton [informant] left?
A. No, Pendleton and I stayed at the Subway Lounge. Moffett said that he would return about 8:00 p.m. We stayed at the Subway Lounge until around 9:00 o'clock. We then went outside and sat in the car a little while and then came back into the Subway Lounge.

It is the contention of the petitioners that agent Tucker could not have truthfully testified that Moffett "didn't return to the Subway until 2:30 a.m. the next morning" unless he had been there the entire time. We think that the petitioners are attempting to read more into the record than the situation warrants. Viewing the Moffett testimony as a whole, it appears that neither the prosecution nor the defense was much concerned with what transpired between 6:20 and 8 p.m., since neither counsel inquired about Tucker's activities during that period. This lapse in questioning is understandable since to obtain a conviction for the Moffett sale it was of no moment where Tucker was during this period. The crucial facts upon which Moffett's conviction hinged were the exchange of money and the promise to deliver heroin which occurred at 6:20 p.m. and the actual delivery of the narcotics at 2:30 a.m. Given the fact that the same prosecutor tried both cases for the Government, it is obvious that he was aware of all the activities of the agents and perhaps thought it would only confuse or prejudice the pre-

sentation of each case to interject details relating to the other defendant.

Because there was no reason for Tucker and the informant to remain at the Subway Lounge between 6:20 and 8 p.m. and because the record does not compel a contrary conclusion, we are unable to say as a matter of fact that Tucker ever testified that he spent the period from 6:20 to 8 p.m. at the Subway Lounge.

The other testimonial contradiction alleged by the petitioners relates to the testimony of agents Hill and Pringle. Against Moffett, the agents testified that at 6:20 p.m. they watched Moffett leave the Subway Lounge and without prearrangement (according to the petitioners) followed him to a point three and one-half miles from the Subway, where they lost his car in heavy traffic. Against Anderson, the same agents testified that at 6:30 p.m., ten minutes after starting to follow Moffett, they trailed Anderson from the Grand Prix to a point about half a mile away.

Two contentions are made concerning the veracity of this testimony. First, petitioners claim that it was impossible for the agents to make the seven-mile trip after Moffett in the space of ten minutes. Surely such an undertaking was physically possible because almost the entire trip was on an expressway. In addition, since the testimony related to events which occurred more than a year before the trials and was taken from the records of separate trials, it is only reasonable to expect the times at best to be close approximations. We are not unmindful of the admonition of the *Spadafora* case that it is unrealistic to expect pinpoint accuracy when time testimony is compared for consistency. This expectation is true not merely in the context of a single trial, but between two separate trials.

Secondly, petitioners argue that the agents "unaccountably" followed Moffett's car and thereby wish to conclude that the agents had no reason to know the identity of Moffett or his car. This is an unjustifiable argument which is, in fact, contradicted by the record. Agent Hill testified regarding what he saw while parked across from the Grand Prix:

> Q. What did you observe, if anything, across the street from the Grand Prix Lounge?
> A. Across the street from the Grand Prix Lounge we observed a black 1954 Buick. This was the same car that we had observed on October 12th and 13th.
> Q. The same car that you observed the defendant Moffett to be driving on October 12th and 13th?
> A. Yes, sir.

It is apparent that agents Hill and Pringle knew the identity of Moffett and his car on December 17th. Their trailing of his movements was no accident.

Concluding as we do that the alleged inconsistencies in the agents' testimony are nonexistent or any trivial, it follows that the perjury charge has not been established. Thus, "the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief." Accordingly, we affirm the district court's order.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Order of the District Court, dismissing the motions

ORDER

There are before the court two motions, each made pursuant to 28 U.S.C. §2255—one by William Anderson in case No. 66 C 2241 (hereinafter the "Anderson motion") and the other by Harold Moffett in case No. 66 C 2242 (hereinafter the "Moffett motion"), considered together because of the interrelation of the allegations of the two motions.

William Anderson, who was charged in a four-count indictment in cause No. 65 CR 129 with violations of 26 U.S.C. 4705(a) and 21 U.S.C. 174, was acquitted on Counts I and II and was found guilty on Counts III and IV. He was sentenced to a term of fifteen years.

Harold Moffet, who was charged in a four-count indictment in cause No. 65 CR 128 with violations of 26 U.S.C. 4705(a) and 21 U.S.C. 174, was found guilty on all counts and was sentenced to a term of ten years.

Each of the petitioners is presently incarcerated in the United States Penitentiary at Leavenworth, Kansas.

Except for necessary differences in language, the Anderson motion and the Moffett motion are similar. In each, the petition claims that testimony given by witnesses at his trial was inconsistent with that given at the trial of the other petitioner. In each, the petitioner claims the knowing use of perjured testimony by certain agents and officers of the United States, and in each, petitioner claims that those agents and officers knew of the alleged

inconsistent testimony given at the other petitioner's trial and that there was therefore a wrongful withholding of evidence which tended to demonstrate the innocence of the moving petitioner.

The respondent government and each of the two petitioners appear to be in agreement on one point: The court transcript of petitioners' respective trial proceedings is dispositive of the claims made by each petitioner in his motion under Section 2255.

In each of these cases the respondent government has moved to dismiss, contending that the facts shown by the trial court transcripts in each of the cases show conclusively that the petitioner is entitled to no relief.

In case No. 66 C 2241 and in case No. 66 C 2242, the court has examined and considered the motion made by the petitioner therein, together with the respective file and record, including the transcript of the proceedings had at the moving petitioner's trial, and is of the view that they conclusively show, as to each of the said motions, that the petitioner is entitled to no relief and that no hearing should be had on the motion made in either case.

The court has carefully examined the transcripts of proceedings had at the trial of each of the petitioners and that examination does not reveal to this court any of the inconsistencies which each of the petitioners would read into the testimony and which each alleges to exist.

The court is of the view that the contentions made by the respondent government in each of the two cases should be sustained and that the motion to dismiss made by respondent government in each of the two cases should be granted.

It is, therefore, ORDERED, in the case of *William Anderson* v. *United States of America*, cause No. 66 C 2241—

(a) That the motion to dismiss made by respondent government be and it hereby is granted; and

(b) That the motion of William Anderson made pursuant to 28 U.S.C. §2255 be and it hereby is denied.

It is FURTHER ORDERED, in the case of *Harold Moffett* v. *United States of America*, cause No. 66 C 2242—

(a) That the motion to dismiss made by respondent government be and it hereby is granted; and

(b) That the motion of Harold Moffett made pursuant to 28 U.S.C. §2255 be and it hereby is denied.

ENTER:

J. S. Perry
Judge

DATED: Chicago, Illincis
October 30, 1967.

APPENDIX C

Opinion of the Court of Appeals on the Appeal of Petitioner Anderson from his original conviction

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM — APRIL SESSION, 1966

No. 15521
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM ANDERSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 6, 1966

Before CASTLE and SWYGERT, *Circuit Judges*, and GRANT, *District Judge*.

PER CURIAM. William Anderson, defendant-appellant, prosecutes this appeal from a judgment of conviction and sentence entered upon a jury verdict finding him guilty of the unlawful sale and the unlawful concealment etc., of a designated quantity of heroin, a narcotic drug, on January 11, 1965, in violation of 26 U.S.C.A. §4705(a) and 21 U.S.

C.A. §174, as charged in two counts of a four count indictment. The defendant was acquitted on the other two counts which charged similar offenses alleged to have occurred on December 17, 1964. The defendant was sentenced to fifteen years imprisonment.

Defendant contends[1] that his acquittal on the alleged December 17, 1964 offenses is inconsistent with his conviction of the January 11, 1965 charges and requires vacation of the judgment on all counts and the remandment of the cause for a new trial. But defendant's premise that inconsistency exists is faulty. Separate offenses on different dates are involved. The fact that the jury acquitted the defendant of the charges involving the alleged December transaction cannot be construed as effectuating a determination of the facts adverse to the government regarding the January sale and concealment etc., of which he was convicted.

Moreover, inconsistency in a verdict on separate counts does not entitle a defendant to reversal or vacation of a judgment of conviction. *Dunn* v. *United States,* 284 U.S. 390, 393-394; *United States* v. *Russo,* 7 Cir., 335 F. 2d 299, 301; *United States* v. *Margoles,* 7 Cir., 294 F. 2d 371, 372-373.

The judgment order of conviction and sentence appealed from is affirmed.

AFFIRMED

---

[1] The defendant also contended that the government failed to prove that the substance involved was heroin. But this contention was not pursued on oral argument. The government had filed an additional appendix which reveals that defendant stipulated that a government chemist if called as a witness would testify that the government's exhibit, a brownish-light brown powder (the substance the evidence shows the defendant delivered to an informer-purchaser), was heroin.

APPENDIX D

Order of the Court of Appeals affirming the original conviction of Petitioner Moffett

In The

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

September 23, 1966

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

No. 15509
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
HAROLD MOFFETT,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This court having considered the record in this case transmitted by the district court to this court as well as the briefs filed by the respective parties herein, and having heard oral arguments in open court by counsel for said parties, and having taken the case under advisement for decision, the court has conferred thereon and is now of the opinion and accordingly holds and adjudges that the judgment from which this appeal was taken is supported by the record herein and law appertaining thereto.

Wherefore the judgment from which this appeal was taken is affirmed and the clerk of this court is directed to enter the judgment of this court accordingly.